Supreme Court, U.S.
FILED
APR 11 1994
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No. 93-1280

In the Supreme Court of the United States

OCTOBER TERM, 1993

NICHOLAS L. BIANCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted evidence obtained pursuant to the "roving bug" provision of the federal wiretap statute, 18 U.S.C. 2518(11)(a).

2. Whether the warrant-authorized search of petitioner Failla's home satisfied the particularity requirements of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A88) is reported at 998 F.2d 1112. The opinions of the district court (Pet. App. A93-A101, A115-A129) are unreported. A related opinion of the United States District Court for the District of Massachusetts (Pet. App. A130-A399) is reported at 771 F. Supp. 1266.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1993. Petitions for rehearing were denied on September 20, 1993 and on October 7, 1993. Pet. App. A88-A93. On December 8, 1993, Justice Thomas extended the time for filing a petition for a writ of

certiorari to and including February 4, 1994, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioners were convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); and conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Petitioners Milano, Pugliano, and Failla were also convicted of committing violent crimes in aid of racketeering, in violation of 18 U.S.C. 1959(a)(5). Petitioners Pugliano and Failla were also convicted of wire fraud, in violation of 18 U.S.C. 1343. Bianco was sentenced to 137 months' imprisonment, Failla to 120 months' imprisonment, Milano to 396 months' imprisonment, and Pugliano to 151 months' imprisonment, with each sentence of imprisonment to be followed by a three-year term of supervised release. The court of appeals affirmed. Pet. App. A1-A88.

1. This case involves petitioners' participation in the affairs of the Patriarca family of La Cosa Nostra. The facts relevant to the petition involve the circumstances surrounding two aspects of the government's investigation of petitioners' activities.

a. On January 9, 1990, FBI agents executed a search warrant at petitioner Failla's home in East Hartford, Connecticut. The warrant authorized the seizure of the following items: "Notes, Ledgers, Envelopes, Papers, and Records Containing Initials, Names, Addresses, Dollar Amounts, Codes, Figures,

and the Like: United States Currency." The application stated that the items sought to be discovered were evidence of violations of 18 U.S.C. 894 and 1962. The supporting affidavit (to which the warrant explicitly referred) detailed Failla's loansharking business and stated that the agents were looking for evidence of Failla's loansharking. While the agents were executing the warrant, they brought items to the attention of Agent William Hutton, who headed the search team and had responsibility to determine whether items should be seized. Hutton had familiarized himself with the warrant and its supporting affidavit, and he understood that the purpose of the search was to discover evidence of loansharking. See Pet. App. A10-A11, A19-A21, A124-A126.

b. During 1989, the government decided that because some members of the Patriarca family suspected that the government was attempting to monitor their activities, the family had begun to structure its communications to avoid electronic surveillance. After learning in October of 1989 that the Patriarca family intended to induct several new members into La Cosa Nostra, the government decided to seek a warrant under 18 U.S.C. 2518(11)(a), which would authorize a "roving bug," that is, an advance judicial authorization of electronic interception without advance specification of the location of the interception. Pursuant to Section 2518(11)(a)(i) (which requires approval of a roving bug by a listed officer of the Department of Justice), on October 24, 1989, the United States Attorney's Office submitted to the Department of Justice a proposed application, an affidavit from an FBI agent, and a proposed order. Those materials described the efforts by the targeted individuals to thwart surveillance, as well as informa-

tion regarding crimes committed by those individuals. The materials did not, however, mention the induction ceremony. See Pet. App. A24-A27.

On October 26, 1989, the FBI learned that the induction ceremony was scheduled for Sunday, October 29, 1989, at or near Wellington Circle in Medford, Massachusetts. Suspecting that one of the inductees might be a Massachusetts prisoner named Vincent Federico, the FBI contacted the Massachusetts Department of Correction and learned that Federico had requested a 28-hour furlough, beginning on the morning of October 29, 1989. Federico's furlough application reported that he intended to stay at the house of his brother-in-law, Stephan DiStefano, at 34 Guild Street, in Medford, near Wellington Circle. See Pet. App. A27-A28.

On October 27, 1989, the prosecutor handling the case delivered the interception application to Judge David Nelson of the United States District Court for the District of Massachusetts. Shortly after the Justice Department approved the application, Judge Nelson signed the order, including a requirement that the government notify the court of all surreptitious entries to install listening devices in advance if possible, and as soon as possible after the entry if advance notice was not possible. See Pet. App. A29-A31.

On October 28, 1989, after observing the DiStefano family leave their home at 34 Guild Street, the FBI entered the home to install listening devices. The prosecutor unsuccessfully attempted to notify Judge Nelson by telephone before the entry, but succeeded in advising the judge of the entry the next morning. Later that day, the agents observed two of the targeted individuals enter 34 Guild Street, and the

interceptions began. During the interceptions, the government overheard and recorded a ceremony that inducted four members of the Patriarca family, including Federico, into La Cosa Nostra. During the ceremony each inductee took an oath of allegiance, submitted to a ritualistic pricking of his finger, and was assigned a "capo" or boss who was to supervise his criminal activity. Old members explained the origins of La Cosa Nostra, instructed the inductees to bring "to the table" all legal and illegal business deals with nonmembers, and extracted promises from the inductees that on orders they would kill their brother or son "without hesitation." See Pet. App. A32-A34.

2. Based in part upon the evidence obtained through the Failla search and the "roving bug," separate indictments were returned in the United States District Court for the District of Connecticut (this case) and in the United States District Court for the District of Massachusetts (*United States* v. *Ferrara*). Motions to suppress the recordings of the induction ceremony were filed in both cases. On April 15, 1991, Judge Wolf issued a lengthy opinion denying the motions filed by the defendants in the Massachusetts case. Pet. App. A130-A399.

On April 19, 1991, the district court in this case denied the motions filed by petitioners, adopting "in its entirety" (Pet. App. A100) Judge Wolf's findings of fact and conclusions of law. *Id.* at A93-A101. The district court also denied a motion filed by Failla to suppress the evidence seized during the January 9, 1990, search of his Connecticut residence. Pet. App. A115-A129. The court rejected Failla's contention that the warrant was overly broad, finding that the warrant, when examined together with the appli-

cation and the affidavit, satisfied the Fourth Amendment's particularity requirement. *Id.* at A122-A129.

3. The court of appeals affirmed. Pet. App. A1-A88.

a. The court of appeals rejected the argument that the warrant authorizing the search of Failla's home was not sufficiently particular to satisfy the Fourth Amendment. Pet. App. A8-A23. The court agreed with Failla's contention that the warrant itself was overly broad because it did not describe in sufficient particularity the items to be seized and made no mention of any criminal statute or criminal conduct. *Id.* at A11-A18. The court nonetheless held that the warrant was rendered sufficient by its reference to the supporting affidavit. *Id.* at A18-A21. Although the warrant did not expressly incorporate the affidavit and the affidavit was not physically attached to the warrant, the court declined to "adhere to formal requirements of incorporation and attachment where as here, it is clear that the involved parties [the federal agents and Failla] were aware of the scope of and limitations on the search." *Id.* at A20. The court explained that the affidavit spelled out the nature and purpose of the proposed search, by detailing its motivation and by specifying the nature of the documents sought. *Id.* at A21. The court also noted that Agent Hutton actively supervised the search after having read the affidavit. Because the agents remained within the scope of the warrant and affidavit when read together, the court concluded that the search was reasonable. *Id.* at A22.

b. The court of appeals also rejected petitioners' challenges to the introduction of the recording of the induction ceremony obtained from the "roving bug." Pet. App. A23-A87. First, the court held that only petitioners Milano and Failla had standing to chal-

lenge the electronic interception of the induction ceremony because they were the only defendants who were present when the recording was made, and because none of the other petitioners claimed any proprietary or possessory interest in the building where the intercepted conversations occurred. *Id.* at A49-A52.

The court next rejected petitioners' constitutional challenge to 18 U.S.C. 2518(11)(a). Pet. App. A52-A65. The court found that the substantial conditions imposed by Congress on the issuance of a "roving bug," in addition to the substantial conditions already imposed on the issuance of any order for electronic surveillance, satisfied the particularity requirement of the Fourth Amendment. Pet. App. A62-A63.

The court then considered petitioners' contentions that the recording should be suppressed because of violations of the statute in this case. The court first addressed petitioners' argument that the absence from the application of the information in the government's possession indicating that 34 Guild Street might be the site of the induction ceremony violated Section 2518(11)(a)(ii)'s requirement that the government provide the court a "full and complete statement as to why specification [of the place where the communication is to be intercepted] is not practical." Pet. App. A68-A76. The court did not directly address the question whether the application violated the statute,[1] but concluded in any event that petitioners' argument on that point did not justify suppression. *Id.* at A72-A76. The court stated that

[1] The court stated only that "the government should have disclosed to the court the information relating to 34 Guild Street." Pet. App. A75.

violations of that disclosure requirement should result in suppression only if the violations satisfied the standard articulated by this Court in *Franks* v. *Delaware*, 438 U.S. 154 (1978). The court then accepted the district court's findings that the government did not engage in "deliberate falsehood or reckless disregard for the truth," and that "the nondisclosure * * * was immaterial." Pet. App. A72.[2] Accordingly, the court upheld the district court's conclusion that the nondisclosure of the 34 Guild Street information did not justify suppression of the recording. *Id.* at A76.

The court also rejected petitioner Milano's argument that the recording should have been suppressed because of the government's failure to disclose in the application prior applications for interceptions of communications involving persons mentioned in the application. Pet. App. A83-A87. The court agreed that the government violated Section 2518(1)(e) when it failed to disclose prior applications not only for the principal "targets" of the surveillance, but also for all other persons mentioned in the application. Pet. App. A83. The court nevertheless concluded that suppres-

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[2] On the latter point, the court of appeals explained that it agreed with the district court's conclusion that

> there was enough independent information of the nature of the suspects' crimes and their evasive methods to justify issuing the roving order, even without the information about 34 Guild Street. Moreover, even if the judge had been advised of the anticipated induction ceremony at 34 Guild Street, the information would not have eliminated the need for a roving order, because the members of the enterprise were trying to avoid detection, and could easily have changed the location at the last minute.

Pet. App. A75-A76.

sion was not an appropriate remedy because the failure to disclose prior applications was inadvertent; the court noted that there were no judicial decisions interpreting Section 2518(1)(e) at the time the application was filed. Pet. App. A85-A87.

ARGUMENT

1. Petitioners raise several challenges to the introduction at their trial of the recording obtained pursuant to the "roving bug" warrant authorized under Section 2518(11)(a). Because the warrant in this case appears to be the first to result in published judicial opinions regarding that provision,[3] review by this Court of those questions would be premature. In any event, petitioners fail to offer any strong reason for doubting the correctness of the court of appeals' rejection of petitioners' claims.

a. Petitioners contend (Pet. 32-42) that Section 2518(11)(a) is unconstitutional because it does not conform with the particularity requirement of the Fourth Amendment. In light of the detailed provisions that Congress fashioned to circumscribe the use of the provision and the important law-enforcement purposes that justify it, that claim lacks merit.

First, Section 2518(11)(a)(ii) itself requires that the "roving-bug" application include "a full and complete statement as to why * * * specification [of the place where the communication is to be intercepted] is not practical and identif[y] the person[s] committing the offense and whose communications are to be inter-

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[3] The first two decisions cited at Pet. App. A48-A49 involved the wiretap provisions in 18 U.S.C. 2518(11)(b). The third decision (*United States* v. *Ferrara*, 771 F. Supp. 1266 (D. Mass. 1991)) considered the warrant at issue here.

cepted." That requirement limits the use of the statute to cases where conventional surveillance is impractical. Furthermore, the underlying provisions of Section 2518, which generally apply in full to cases under Section 2518(11)(a),[4] substantially vitiate petitioners' concerns (Pet. 38) about "[t]he general warrant, the unrestricted search, the roving commission." Section 2518(4) requires that the application include a list of the persons whose communications are to be intercepted, a particular description of the types of communications to be intercepted, and a description of the offense to which the communications relate. Also, a court can issue a warrant only if it determines that the application establishes probable cause to believe that a person is committing one of the serious offenses listed in 18 U.S.C. 2516, that the requested surveillance will discover communications concerning that offense, and that normal investigative procedures are inadequate or unduly dangerous. 18 U.S.C. 2518(3). Finally, interceptions under Section 2518(11) cannot occur "until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order." 18 U.S.C. 2518(12).

The distinctive feature of Section 2518(11)(a) is its authorization of a warrant that does not specify the particular "place" to be searched. But the analysis

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[4] The provisions of Section 2518(11) are not a separate authorization for interceptions, but rather as a description of circumstances in which a warrant may be secured without compliance with the requirements of Section 2518(1)(b)(ii) and (3)(d) "relating to the specification of the facilities from which, or the place where, the communication is to be intercepted."

employed by this Court in *United States* v. *Karo*, 468 U.S. 705 (1984), indicates that the Fourth Amendment does not impose a blanket requirement of advance identification of the place to be searched. In response to the government's concern that it might be difficult to secure a warrant authorizing monitoring of a beeper because of the difficulty of predicting the location of the beeper, the Court explained:

> The Government contends that it would be impossible to describe the "place" to be searched, because the location of the place is precisely what is sought to be discovered through the search. However true that may be, it will still be possible to describe the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested. In our view, this information will suffice to permit issuance of a warrant authorizing beeper installation and surveillance.

Id. at 718. That analysis suggests that the detailed specification requirements of Section 2518(11)(a) satisfy the demands of the Fourth Amendment. The statute requires specification of the information known to the officers, coupled with an explanation of why further specificity is impractical. The Constitution does not bar that form of warrant.[5]

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[5] In any event, because no court has ever ruled that Section 2518(11)(a) is unconstitutional, the agents were entitled to rely on those provisions at the time they intercepted the communications at issue here. Accordingly, suppression of that evidence would not be appropriate. *Illinois* v. *Krull*, 480 U.S. 340, 349-355 (1987).

b. Petitioners also contend (Pet. 20-31) that the court of appeals erred in relying on *Franks* v. *Delaware*, *supra*, in declining to suppress the recording here notwithstanding the court's conclusion that the government violated the provisions of Section 2518 in the course of obtaining the warrant.[6]

i. Petitioners' presentation rests on the proposition—which they neither discuss nor defend—that the government's failure to include the information about 34 Guild Street violated the "full and complete statement" requirement of Section 2518(11)(a)(ii). As discussed above, however, the court of appeals did not explicitly conclude that the government had violated that provision. Nor would it have been correct to have

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[6] The petition refers in passing (Pet. 29) to the court of appeals' conclusion (Pet. App. A83) that the government violated 18 U.S.C. 2518(1)(e) by failing to disclose prior interception applications with respect to persons who were named in the present application, but who were not targets. Because the petition does not address or question, however, the reasons articulated by the court of appeals for not requiring suppression because of that violation (Pet. App. A85-A87), the discussion in the text is limited to petitioners' objections to the nondisclosure of one possible location of the interception.

In any event, this Court's decision in *United States* v. *Donovan*, 429 U.S. 413 (1977), strongly supports the court of appeals' conclusion that the failure to disclose the prior applications did not justify suppression. In *Donovan*, the Court held that a violation of the provision in 18 U.S.C. 2518(1)(b)(iv) requiring the government to identify the individuals whose conversations would be intercepted did not justify suppression because that provision is not one of "those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 429 U.S. at 433-434. That analysis applies in this case as well.

found a violation. The purpose of the "full and complete statement" requirement is to explain why it "is not practical" to specify the place where the communication is to be intercepted. The information about 34 Guild Street, although it made it likely that some communications would be intercepted at that location, was not material to the question whether the government needed permission to conduct surveillance at unspecified places. The court of appeals recognized that the material in the application included "enough independent information of the nature of the suspects' crimes and their evasive methods to justify issuing the roving order." Pet. App. A75. The court of appeals also recognized that inclusion of the 34 Guild Street information would not have affected the merits of the application, explaining that "the information would not have eliminated the need for a roving order, because the members of the enterprise were trying to avoid detection, and could easily have changed the location at the last minute." *Id.* at A76. Accordingly, the government's failure to include the information—which identified only one possible location of the requested surveillance, and in no way undermined the need for authority to intercept conversations at other places—did not violate the statute.

ii. Even if the failure to include the information is treated as a violation of Section 2518(11)(a)(ii), petitioner's argument that the statute requires suppression would be incorrect. As this Court repeatedly has recognized, the statutory suppression remedy set forth in Section 2518(10)(a) is limited to cases where the communication was "unlawfully intercepted," a term which does not include "every failure to comply fully with any requirement provided [in the statute],"

but is instead limited to "a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 432-434 (1977) (quoting *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); and *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)).

As the Court explained in *Donovan*, even where a statutory requirement plays a central role in the statutory framework, a violation of the requirement does not justify suppression if the purpose that the particular procedure was designed to accomplish has been satisfied in spite of the error. Hence, in *Donovan* the Court concluded that it was not appropriate to suppress evidence based on the absence from the application of a complete list of the individuals whose conversations would be intercepted. The Court explained that "[i]n no meaningful sense can it be said that the presence of that information as to additional targets would have precluded judicial authorization of the intercept." 429 U.S. at 436. In this case as well, the judgment of the court of appeals rests on its view that inclusion in the application of the information about 34 Guild Street would not have eliminated the need for a warrant or affected the district court's decision to issue one. Accordingly, the statute did not require suppression.

iii. Finally, even if petitioners were correct in their view that the statute was violated, and that the transgression infringed a provision for which suppression is a remedy available under Section 2518(10)(a), there would be no need for the Court to

review petitioner's contention that the court of appeals erred in relying on *Franks* for its refusal to suppress the recording. An inadvertent and immaterial mistake in an application for a surveillance order does not render the products of that order inadmissible. The Court's analysis in *Donovan*, summarized above, strongly supports a practical interpretation of the statute that would take account of this Court's decision in *Franks*. See also *Scott* v. *United States*, 436 U.S. 128, 139 (1970). Similarly, the courts of appeals regularly have applied the *Franks* standard in determining whether misstatements in applications for surveillance orders would justify suppression.[7] The cases on which petitioners rely involve distinct questions regarding the applicability to statutory exclusionary provisions of other rules this Court has articulated under the Fourth Amendment.[8] Because

[7] See, *e.g.*, *United States* v. *Cole*, 807 F.2d 262, 267-268 (1st Cir. 1986), cert. denied, 481 U.S. 1069 (1987); *United States* v. *Guerra-Marez*, 928 F.2d 665, 670-671 (5th Cir.), cert. denied, 112 S. Ct. 322 (1991); *United States* v. *Garcia*, 785 F.2d 214, 221-222 (8th Cir.), cert. denied, 475 U.S. 1143 (1986); *United States* v. *Ippolito*, 774 F.2d 1482, 1484-1487 (9th Cir. 1985); *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987); see also James G. Carr, *The Law of Electronic Surveillance*, § 6.2(d)(1)(A), at 6-56 (2d ed. Supp. 1994) ("[T]he *Franks* standard applies to Title III applications and orders.").

[8] Compare *United States* v. *Baranek*, 903 F.2d 1068, 1071-1072 (6th Cir. 1990) (Fourth Amendment plain-view doctrine applies by analogy in cases under federal wiretap statute), with *United States* v. *Spadaccino*, 800 F.2d 292, 296 (2d Cir. 1986) (good-faith exception to the exclusionary rule did not insulate from suppression evidence obtained in violation of Connecticut's electronic surveillance statute); and *United States* v. *Vest*, 813 F.2d 477, 481-482 (1st Cir. 1987) (suppression appro-

there is no disagreement on the applicability of *Franks* to statutory exclusionary provisions, there is no need for review by this Court.

c. Petitioners Bianco and Pugliano argue (Pet. 52-63) that the court of appeals erred in concluding that they lacked standing to challenge the introduction of the electronic surveillance evidence. That claim is meritless.[9]

Section 2518(10)(a)(i) provides that "[a]ny aggrieved person" may move to suppress electronic surveillance evidence when "the communication was unlawfully intercepted." Section 2510(11) defines "aggrieved person" as "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." As the Court explained in *Alderman* v. *United States*, 394 U.S. 165 (1969), that provision was not designed to extend standing to all persons who have been adversely affected by the use of electronic surveillance evidence. Instead, "[t]he Act's legislative history indicates that 'aggrieved person,' the limiting phrase currently found in Fed. Rule Crim. Proc. 41(e), should be construed in accordance with existent standing rules." 394 U.S. at 175 n.9. An individual has standing under those rules only if the government intercepted "conversations of a peti-

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priate where federal wiretap application violated the "innocent recipient" exception formulated in *United States* v. *Jacobsen*, 466 U.S. 109, 113-118 (1984)).

[9] Moreover, because the court of appeals rejected the claims advanced by the petitioners who had standing, the standing claim would alter the judgments against petitioners Bianco and Pugliano only if the Court granted review of the judgment of the court of appeals on one of the substantive challenges to introduction of the evidence and reversed on that basis.

tioner himself or conversations occurring on his premises, whether or not he was present or participated in those conversations." *Id.* at 176.

Petitioners Bianco and Pugiliano cannot satisfy that standard. They were not present during the induction ceremony, and their conversations accordingly were not recorded. Similarly, neither of them had any ownership interest in the Guild Street residence or any other basis for a legitimate expectation of privacy in it. The decision of the court of appeals denying Bianco and Pugiliano standing to challenge the surveillance is correct and does not warrant review by this Court.

2. Petitioners also contend (Pet. 43-51) that the court of appeals erred in holding that the warrant for the search of Failla's house satisfied the Fourth Amendment's particularity requirement.[10] Petitioners contend that a warrant that is unduly broad on its face violates the Fourth Amendment even if the accompanying affidavit adequately narrows the search, unless the affidavit is incorporated into the warrant by reference and is physically attached to the warrant.

a. In order to prevent government officials from engaging in "a general, exploratory rummaging in a person's belongings," the Fourth Amendment requires that search warrants contain "a 'particular

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[10] Petitioner Failla was the only defendant who sought to suppress the items seized during the search of his home. See Pet. App. A11; see also Pet. 13. No claim has been made that petitioners other than Failla were present at the time of the search, or that other petitioners had a privacy interest in Failla's home. Accordingly, only petitioner Failla has standing to challenge the search. *Rakas* v. *Illinois*, 439 U.S. 128, 138-148 (1978).

description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). That particularity requirement "makes general searches * * * impossible and prevents the seizure of one thing under a warrant describing another." *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965). Whatever the merits of petitioner's claim that the warrant in this case was too broad, the specificity of the affidavit brought the search within the confines of the Fourth Amendment. The warrant on its face refers specifically to the affidavit. Also, as the court of appeals explained, the search was conducted in conformity with the affidavit, under the supervision of an individual fully informed as to the scope of the search outlined in the affidavit. Pet. App. A21 ("[T]he presence and activity of agent Hutton, who had read the affidavit and who approved each seizure, satisfies us that the limitations included in the affidavit were observed."); see *id.* at A11.[11] In those circumstances, the particularity requirement does not require suppression of the evidence gained from the search.

Petitioners argue (Pet. 43-45) that the decision of the court of appeals conflicts with a number of decisions that they describe as holding that an affidavit can cure vagueness in a search warrant only if the affidavit is attached to, and incorporated by reference in, the warrant. A number of courts have

[11] As petitioners suggest (Pet. 45 n.13), the court of appeals apparently erred in stating that the affidavit was present at the search; the record does not indicate whether or not the affidavit was present at the search. The analysis of the court of appeals, however, appears to rest on the agents' compliance with the limitations set forth in the affidavit, rather than the physical presence of the affidavit at the search scene. See Pet. App. A20-A21.

looked to those two factors in deciding whether to consider an affidavit in evaluating the validity of a warrant.[12] But the purpose of those requirements is to ensure that both the searchers and the person whose premises are to be searched are informed of the scope of the authorized search. Accordingly, several courts of appeals that have considered cases in which the search actually was conducted in accordance with the limitations set forth in an affidavit used to secure the warrant have declined to hold the search invalid. *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983); *United States* v. *Gahagan*, 865 F.2d 1490, 1497 (6th Cir.), cert. denied, 492 U.S. 918 (1989); see 2 Wayne R. LaFave, *Search and Seizure* § 4.5(a) at 209 (2d ed. 1987) (if description contained in warrant is inadequate, "it is appropriate to look to the description appearing in the warrant application or affidavit *if* it is clear that the executing officers were in a position to be aided by these documents"); see also *United States* v. *Haydel*, 649 F.2d 1152, 1156-1157 (5th Cir. 1981) (relying on supporting affidavit to cure ambiguity in warrant even though record did not clearly indicate that affidavit was attached to warrant, because the affidavit was available at the search site and the searching agents were aware of the scope of the search described in the affidavit), cert. denied, 455 U.S. 1022 (1982). And none of the

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[12] See, *e.g.*, *United States* v. *Beaumont*, 972 F.2d 553, 560-563 (5th Cir. 1992), cert. denied, 113 S. Ct. 1821 (1993); *United States* v. *Harris*, 903 F.2d 770, 775 (10th Cir. 1990); *United States* v. *Vaughn*, 830 F.2d 1185, 1186 (D.C. Cir. 1987); *United States* v. *Crozier*, 777 F.2d 1376, 1381-1382 (9th Cir. 1985); *United States* v. *Johnson*, 541 F.2d 1311, 1315-1316 (8th Cir. 1976).

decisions on which petitioners rely establishes that any court would have suppressed the results of a search, like this one, where the searching officers limited their conduct in accordance with an affidavit that is specifically referenced in the warrant that authorized the search.[13] Accordingly, petitioners have

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[13] The court in *United States* v. *Beaumont*, 972 F.2d 553, 560-563 (5th Cir. 1992), cert. denied, 113 S. Ct. 1821 (1993), held only that a general warrant could not be cured by an affidavit that merely accompanied the warrant, in the absence of, "at the very least, a cursory reference to the affidavit upon which an executing officer may have to rely." 972 F.2d at 561. The warrant in this case contained such a reference. See Pet. App. A19; see also *Beaumont*, 972 F.2d at 560 (discussing *United States* v. *Cook*, 657 F.2d 730, 736 (5th Cir. 1981), which upheld the partial validity of the warrant "because the warrant had referred to the affidavit and was accompanied by it" (emphasis omitted)). The Fifth Circuit's earlier decision in *Haydel* lends no support to petitioner's position, for the reasons explained in the text.

In *United States* v. *Strand*, 761 F.2d 449, 452-454 (8th Cir. 1985), the court stated that a warrant that failed to list the particular items that were the subject of the search could not be cured by the affidavit accompanying the warrant because the warrant did not in any way incorporate the affidavit's listing of those items. The opinion in that case, however, does not indicate that the affidavit was used to limit the scope of the search. Furthermore, the Eighth Circuit subsequently has explained that the reason a general warrant cannot be cured by the specificity of the affidavit is that "the affidavit is neither part of the warrant nor available for defining the scope of the warrant." *United States* v. *Curry*, 911 F.2d 72, 76-77 (1990), cert. denied, 498 U.S. 1094 (1991). Accordingly, it seems likely that the Eighth Circuit would not require suppression in a case, like this one, where the affidavit in fact was used to define the scope of the warrant.

In re Application of LaFayette Academy, Inc., 610 F.2d 1, 4-5 (1st Cir. 1979), appears to turn on the government's failure to

not established the existence of a conflict warranting review by this Court.

b. In any event, even if the court of appeals erred in upholding the validity of the warrant, suppression of the fruits of the search would be improper under *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), because the agents acted in good faith in obtaining and executing that warrant.[14] See *United States* v. *Luk*, 859 F.2d 667, 677-678 (9th Cir. 1988). Petitioners' objection is that the substance of the affidavit was not specifically repeated in the body of the warrant itself. But here, as in *Sheppard*, that aspect of the warrant is ultimately

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"inform the person subject to the search and seizure what the officers are entitled to take." *Id.* at 5. In a case involving a sealed affidavit like the one here, however, it should be enough to make the affidavit "available * * * for use in preparing the motion to suppress," as was done here. *Wuagneux*, 683 F.2d at 1351 n.6. The First Circuit has not confronted such a case, and there is little reason to believe that it would resolve that issue against the validity of the search.

Finally, as suggested by petitioner's citation (Pet. 44) of *United States* v. *Crozier*, 777 F.2d 1376, 1381-1382 (9th Cir. 1985), the Ninth Circuit has adopted a relatively restrictive rule in this area. See *United States* v. *Towne*, 997 F.2d 537, 547-550 (9th Cir. 1993) (court "remain[s] rigid in [its] insistence" on express incorporation of affidavit and presence of affidavit at search). But the restrictions imposed by that rule have relatively little impact on suppression issues, because the Ninth Circuit has made it clear that it will not suppress materials seized in searches that do not comply with that rule if the officers acted in good faith. See *id.* at 550 n.6 (citing *United States* v. *Luk*, 859 F.2d 667, 677-678 (9th Cir. 1988)).

[14] The court of appeals declined to consider that question because of its conclusion that the search did not violate the Fourth Amendment. Pet. App. A23.

attributable to the action of the authorizing judge, not the searching officers. See 468 U.S. at 989-990.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994